91-554

(1)

No.___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MILTON REINER,

Petitioner,

v.

TOLEDO HOTEL INVESTORS LIMITED PARTNERSHIP

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Federal Rule of Civil Procedure 60(b) is a proper vehicle for preventing an innocent party from being punished for his attorney's gross misconduct where a default judgment in the amount of $1,022,921 is entered against defendant as a result of the attorney's failure to take any action to protect the defendant's interests.

2. Whether a defendant seeking to vacate a default judgment who pleads a defense to the allegations in the Complaint is required to do so with greater specificity than is required in an Answer under the Federal Rules of Civil Procedure.

PARTIES TO THE PROCEEDING

The petitioner is: Milton Reiner.

The respondent is: Toledo Hotel Investors Limited Partnership.[1]

1. American Contract Designers, Inc. and Melanie Reiner were named as defendants in the district court. However, service was never effected on either defendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – *(Continued)*

TABLE OF AUTHORITIES – *(Continued)*

Statutes: Page

No.____

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Milton Reiner, by his attorneys, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, A1-A6) is unreported. The opinion of the district court (App., infra, A7- A15) is also unreported.

JURISDICTION

The court of appeals entered its judgment (App., infra, 1A) on July 1, 1991. Pursuant to Rule 13.1 of the rules of this court, this petition is filed within ninety days of the filing of the court of appeals' judgment as calculated pursuant to Rule 30.1 of the rules of this court. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 60(b) provides:

> **Rule 60. Relief from Judgment Order. (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.**
>
> On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective applications; or (6) any other reason justifying relief from the operation of the judgment . . . .

STATEMENT OF THE CASE

Petitioner, Milton Reiner, seeks review of a court of appeals decision affirming a district court's order refusing to set aside a default judgment in the amount of

$1,022,921 entered against Reiner on December 1, 1989. Jurisdiction in the district court was invoked pursuant to 28 U.S.C. 1332. The plaintiff, Toledo Hotel Investors Limited Partnership, (hereinafter referred to as "Toledo Hotel" or "plaintiff") is an Ohio limited partnership with its principal place of business in Ohio. Defendant/petitioner, Milton Reiner, is a citizen of the State of New York and was at the time the lawsuit was instituted.

In late July, 1989, Milton Reiner ("Reiner") received a letter from plaintiff's counsel enclosing plaintiff's application for entry of a default against him. Upon receipt of the letter, Reiner sought the assistance of his daughter, Lori K. Reiner ("Lori Reiner"), an attorney who was working as an associate with the firm of Bennett, Bricklin & Saltzburg ("BB&S") in Philadelphia, Pennsylvania. By then, the default already had been entered.

After being notified of the lawsuit, Lori Reiner telephoned Toledo Hotel's counsel to determine whether plaintiff would enter into a stipulation setting aside the default. When she was advised that plaintiff would not enter into such a stipulation, Lori Reiner attempted to retain Ohio counsel to represent her father in the lawsuit. The attorney whom she contacted demanded a $50,000 retainer to represent Milton Reiner, an amount considerably beyond his means.[2] Realizing that it would not be possible to retain Ohio counsel, Lori Reiner advised her father that she would attempt to enter her

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2. Though Toledo Hotel took issue in the court below with Milton Reiner's contention that he could not retain counsel for a retainer less than $50,000, it should be noted that in moving for the imposition of sanctions in the district court Toledo Hotel alleged that it incurred fees and costs solely in connection with the petition to vacate the judgment in an amount exceeding $47,000. That sum is unfortunately confirmatory of Milton Reiner's contention that sums far in excess of those available to him were required to obtain counsel to represent him in a commercial dispute where the loss involved was alleged to exceed $1,000,000.

appearance on his behalf. Because she was not admitted to practice in the State of Ohio or in the district court, she sought leave to enter her appearance *pro hac vice* which was granted on August 21, 1989.

Lori Reiner was aware that her father was being treated by a psychiatrist, Howard Green, M.D., for a psychiatric illness at the time the complaint was served and for a substantial period of time prior thereto. Believing that her father, if not for his illness, would not have permitted a default to have been taken against him, Lori Reiner contacted Dr. Green to determine whether he was of the opinion that her father's illness interfered with or prevented him from appropriately responding to the lawsuit. After speaking with Dr. Green, Lori Reiner prepared an affidavit for Dr. Green's review and signature. Dr. Green requested that certain changes be made to the affidavit before he would sign it. After the affidavit was modified as directed by Dr. Green, he signed the affidavit on August 31, 1991.

Believing that the opinions expressed to her by Dr. Green and in his affidavit supported the conclusion that her father did not respond to the complaint because of his illness, Lori Reiner drafted a motion to set aside default pursuant to Federal Rule of Civil Procedure 55 setting forth that reason for her father's failure to respond to the complaint before the default was entered.

Between August, 1989 and February, 1990, Lori Reiner repeatedly assured Milton Reiner that the appropriate motion to set aside the default had been filed and she was awaiting a decision from the district court. Lori Reiner made similar representations to Louis E. Bricklin ("Bricklin") a partner in BB&S. However, Lori Reiner did not file a motion to set aside the default under Rule 55 in August, 1989 or at anytime thereafter. As a result, on December 1, 1989 a default judgment in the amount of $1,022,921 was entered against Reiner.

Finally, in February, 1990, Lori Reiner advised both her father and the partners in BB&S that she had not

filed a motion to set aside the default. At that time, Bricklin and Michael Saltzburg ("Saltzburg") assumed responsibility for representing Milton Reiner's interests and on February 26, 1990 filed a Rule 60(b) motion to set aside the default judgment.

In connection with the Rule 60(b) motion, the deposition of Lori Reiner was taken. In explaining her failure to act, she testified as follows:

> Q. If I understand your testimony, on various occasions between August of 1989 and February of 1990, you took certain steps with respect to the handling of this matter, and I think Mr. Kennedy [plaintiff's counsel] delineated them at length, including the various contacts with Mr. Haggerty [who also represented plaintiff], various contacts with the court clerk, some research concerning how to go about getting the default and/or the default judgment set aside, and there may have been one or two other matters which I have just missed just now, but to which you testified.
>
> Is it generally correct that you did those things during that period of time?
>
> A. That's generally correct. Yes.
>
> Q. Why did you never file a motion to open the default?
>
> A. Most of my efforts that I did during that time period were essentially emotional appeals to people to get the default opened and then the default judgment opened. I'm not a psychiatrist, but I guess it was an emotional block or a mental block that I had about this and I could not get myself to sit down and get this thing done and accomplished.
>
> I don't know how much detail you want me to respond in but my — I mean, my whole family situation changed when my father became sick, and

> my father was always the very strong back bone of this family and then when he became sick and when American Contract Designers went bankrupt, the entire structure of my family life changed and it was very difficult for me to be able to function under those circumstances in connection with those circumstances, and I found myself incapable of taking on this kind of responsibility for my father.

(N.T., L. Reiner at 103-104.)

The district court record is unequivocal that before the default judgment was entered, Milton Reiner inquired of his daughter on several occasions regarding the status of the case and was repeatedly assured by his daughter that she had filed the appropriate motion to set aside the default. (Affidavit of L. Reiner, paragraphs 13,16.) In explaining why she misled her father, Lori Reiner testified:

> I lied to my father because my father, as part of his being sick, would become panicked and become very bad in response to negative factors, and I wanted to try and appease him and tell him that it was being taken care of and this would be one less thing to keep on his mind, don't worry about it, I have this under control, don't worry about this one thing, rather than hear his stress in every phone call . . . .

(N.T., L. Reiner at 104-105).

In explaining why she was not forthright with the partners in BB&S concerning her failure to file the motion to set aside the default, Lori Reiner testified:

> Again, I would think it's the same type of mental block. I could not really accept the fact that this important matter was my responsibility and was not getting done, but at the same time I was unable to do it and I was unable to admit that I could not do it,

> and so I tried to avoid the situation by just saying it's under control.

(N.T., L. Reiner, at 105).

The complaint filed by the plaintiff in this case contained only one count against Milton Reiner. It was entitled "fraud" and alleged that Milton Reiner made certain false representations to plaintiff which induced plaintiff to enter into a contract with American Contract Designers, Inc. ("ACD"). Plaintiff alleged in the complaint that Reiner fraudulently represented "that ACD had the financial ability to perform its obligations under the contract and/or to continue to perform its obligations under the contract and that ACD was in fact continuing to perform its obligations under the contract. (Plaintiff's complaint at 44.)

ACD was a New York corporation which was in the business of performing interior design work, food service planning and the procurement of furniture, furnishings and equipment for the hospitality industry. The corporation was formed by Milton Reiner in December, 1974. Reiner was the sole owner of the stock of the corporation.

In July, 1986, ACD entered into a contract with the plaintiff pursuant to which ACD agreed to design the interior of a hotel and purchase and install furnishings and equipment for the hotel. (Complaint at 9). In the late spring or summer of 1988, ACD became insolvent and was forced into bankruptcy. (N.T., M. Reiner, at 14-15). ACD ceased operations in or about August, 1988. (N.T., L. Reiner, at 17). As a result of its financial problems, several lawsuits were instituted against ACD at or about the time the bankruptcy proceedings were filed. In one of the suits, instituted in the United States District Court for the Eastern District of Pennsylvania by West Hazelton Associates, Reiner was named personally

as a defendant. It was in connection with the *West Hazelton* action that BB&S first represented Milton Reiner.

Because of his dire financial situation, Reiner initially did not retain counsel to defend him in the *West Hazelton* action. However, when he mentioned to his daughter, Lori Reiner, that he intended to meet personally with West Hazelton's attorney to discuss the case, his daughter insisted upon attending the meeting with him.

After attending the meeting, Lori Reiner sought the advice of the partners in BB&S. She advised Bricklin that because of the nature of the claims being asserted against her father, she did not feel that she could adequately represent her father's interests in the *West Hazelton* lawsuit. Thereafter, Saltzburg agreed to represent Reiner's interests on a without fee basis because of Reiner's financial distress. The *West Hazelton* action was concluded prior to the time that Reiner was served with the complaint in this action.

In filing the Rule 60(b) motion in February, 1990, Saltzburg and Bricklin relied upon the affidavit that Lori Reiner had obtained from Dr. Green in August, 1990 to represent that Reiner's psychiatric illness should excuse his failure to have responded to the complaint before the default was entered. In the affidavit, Dr. Green represented that "since on or about April 15, 1987, Milton Reiner has been suffering from an illness diagnosed as major depression" and that in his opinion Milton Reiner, because of the illness, "has been unable to appropriately address and manage many factors affecting his daily life" and that this lawsuit "is an example of the type of negative situation which Milton Reiner has been incapable of coping with . . . ."

Before answering the Rule 60(b) motion, plaintiff took the deposition of Dr. Green and questioned him about his affidavit. Dr. Green testified at deposition that the opinions set forth in the affidavit were accurate and

that to ensure the accuracy of the affidavit he insisted that certain changes be made to the affidavit originally prepared by Lori Reiner before he would sign it. However, he explained at deposition that major depression "has exacerbations and remissions, and that the characteristic nature of a major depression is not that the symptoms remain static, it's that the symptoms change and remissions occur". (N.T., Green, at 56). He testified that he assumed that anyone reading the affidavit would understand the cyclical nature of the illness. (N.T., Green, at 54-56). He further testified that it was his opinion that Milton Reiner's illness was in remission during 1989 when the suit papers in this case were served and, therefore, did not believe that the illness prevented Milton Reiner from taking the necessary action to have his interests protected. (N.T., Green, at 113). Dr. Green also testified that failing to respond to suit papers was not "characteristic" of Milton Reiner but could not offer an opinion with a reasonable degree of medical certainty to explain Milton Reiner's actions. (N.T., Green, at 118-120).

In light of the deposition testimony of Dr. Green, Reiner withdrew reliance upon Dr. Green's affidavit in the first document that was filed on his behalf following the deposition, which was Reiner's reply to plaintiff's answer to the motion to vacate the entry of judgment.

When reliance upon Dr. Green's affidavit was withdrawn in the reply brief, Milton Reiner raised the related issue of his financial distress to explain his failure to answer the complaint before a default was taken. Specific reference was not made to Milton Reiner's financial condition in the Rule 60(b) motion itself as the fact of Milton Reiner's mental illness as attested to in Dr. Green's affidavit was believed to be more than sufficient to explain his conduct in failing to respond to the suit papers. However, the affidavits attached to Milton Reiner's motion had made specific reference to the fact that subsequent to the bankruptcy of his business in August,

1988, Milton Reiner did not have the financial resources to pay an attorney to represent him in lawsuits. (Affidavit of M. Reiner at paragraphs 5-7; Affidavit of L. Reiner at paragraphs 6-7). His financial distress was amplified upon at his deposition and that of his daughter. In response to the questioning of Toledo Hotel's counsel, Reiner testified that he only had $800 in his checking account at the time he was served with the complaint.

The record demonstrates that after being served with the complaint in May, 1989, Reiner forwarded a copy of the complaint to his attorney in New York, Gabriel Kaszovitz, Esquire, to interpose a defense. (N.T., M. Reiner at 35-37; Affidavit of Kaszovitz.) Kaszovitz advised Reiner that he would not represent Reiner because (1) Kaszovitz was not licensed in Ohio, and (2) Reiner's business, ACD, was substantially delinquent in payment of past legal fees. (Affidavit of Kaszovitz.) Kaszovitz further advised Reiner that he would not assist Reiner in obtaining a lawyer in Ohio because Kaszovitz had made similar efforts in the past to locate counsel for Reiner and ACD in other venues, and as a result of the severe financial difficulties of Reiner and ACD, those attorneys had not been paid. (Affidavit of Kaszovitz at 4.) Kaszovitz refused to assist Reiner despite Reiner's representation that the claim being asserted against him had no merit. (Affidavit of Kaszovitz at 5.)

In denying Milton Reiner's motion to set aside the default judgment, the district court specifically charged Reiner with the responsibility for what it termed the "deliberate neglect" of his counsel, Lori Reiner, and the submission by BB&S of Dr. Green's affidavit which the district court characterizes as "definitely misleading".[3]

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3. Lori Reiner and BB&S have vigorously contested in the courts below the district court's conclusion that the affidavit was deliberately misleading. The district court premised its conclusion on the testimony of Lori Reiner that she did not recall whether she told Dr. Green the specific date upon which service of process had been made. But Lori Reiner also testified that she had explained to

(App., infra. A-14). The court of appeals affirmed the district court's order denying Milton Reiner's motion to set aside the default judgment. In doing so, the court of appeals specifically relied upon the alleged "deliberate neglect" on the part of Milton Reiner's counsel. (App., infra., A-5). Specifically mentioned were the fact that Lori Reiner ". . . actively misled her client, disregarded court notices to attend two hearings and failed to file a motion to vacate the entry of default" together with her failure to provide any support for her alleged mental incapacity claim which she asserted was the reason that she did not file a motion to set aside the default. (App., infra. A-6).

The district court was so disturbed by what it deemed to be the "culpable" conduct of counsel, that in its memorandum and order refusing to vacate the default judgment it found that sanctions should be imposed upon counsel before giving counsel an opportunity to be heard on the issue. (App., infra. A-15, A-18). More importantly, in focusing primarily upon the alleged culpable conduct of counsel and imputing that conduct to Reiner, the district court and court of appeals mistakenly concluded that Reiner "from October, 1988 until May, 1989 effectively avoided service of process" and, therefore, was "responsible for a nine month delay in beginning this lawsuit." (App. infra. A-12). That finding is not supported by any evidence in the record.

Dr. Green the purpose for obtaining the affidavit and it is self evident that she could not have done so without referring to the period of time in question. Moreover, Dr. Green testified at deposition that the contents of the affidavit are entirely accurate. The fact that he mistakenly assumed that anyone reading the affidavit would understand the cyclical nature of the illness involved would not seem to provide sufficient basis for attributing improper conduct to Milton Reiner's counsel. However, if counsel's conduct in connection with obtaining the affidavit was "culpable" as found by the district court, that conduct should not have been imputed to Milton Reiner.

On the contrary, after plaintiff instituted the action in October, 1988, it attempted to effect service of the summons and complaint on Reiner at the offices of ACD. Inasmuch as ACD ceased operations prior to the institution of this lawsuit, service could not be effected in that manner.

The district court by order dated February 10, 1989, dismissed the complaint as a result of plaintiff's failure to perfect service on any of the defendants. Plaintiff sought and obtained reconsideration of the order dismissing the complaint and, thereafter, obtained a total of three extensions of time to permit it to perfect service on Milton Reiner.

The record demonstrates that Reiner resided at the same address in New York City for over eleven years. (N.T., M. Reiner, at 4). Therefore, plaintiff could have ascertained Reiner's home address by simply referring to the New York City telephone directory. Plaintiff was aware that Reiner's business had been located in New York City and, therefore, plaintiff had reason to believe that Reiner resided in or about New York City. Though Reiner made no attempt to conceal his whereabouts, it was not until May, 1989 that (1) plaintiff attempted to serve Reiner at his New York residence and (2) Reiner became aware of this lawsuit. It is true that the certified mail correspondence which was sent to Reiner was returned by the post office marked "refused" on May 16, 1989. However, after Reiner refused the certified mail correspondence, plaintiff was permitted to effect service on Reiner by regular mail pursuant to Ohio Rule of Civil Procedure 4.6(C) as permitted by Federal Rule of Civil Procedure 4(c)(2)(C)(i). Therefore, if there was a nine month delay between the time the complaint was instituted and the time it was served upon Reiner, all but a few days of the delay was attributable to the plaintiff's failure to exercise reasonable efforts to locate Reiner and not by any conduct, culpable or otherwise, on the part of Reiner.

In its haste to attribute the alleged culpable conduct of Reiner's attorney to Reiner, the district court also concluded that he had not alleged a meritorious defense in moving to set aside the default judgment. The record demonstrates, however, that Reiner's Rule 60(b) motion was accompanied by a proposed answer in which Reiner set forth affirmative defenses not only denying that he committed fraud or made misrepresentations, but asserting that ACD did not commit any breach of contract. Reiner also submitted an affidavit in support of those affirmative defenses and represented under oath that it was plaintiff and not ACD which actually breached the contract.

The court of appeals' opinion adopted the district court's conclusion that the defenses alleged in the proposed answer were not defenses to any fraud which Reiner may have committed in his personal capacity as an officer of ACD. In finding that Milton Reiner failed to set forth a meritorious defense on his own behalf, the court of appeals apparently concluded that "general denials" or "conclusory statements" that a defense exists are insufficient to support the opening of a default judgment. In so concluding, the court of appeals imposed a burden far in excess of that contemplated by the provisions of Rule 8 of the Federal Rules of Civil Procedure which only requires a party to state in short and plain terms the party's defenses and provides for all pleadings to be construed as to do substantial justice.

REASONS FOR GRANTING THE PETITION

The decisions of the district court and court of appeals in this case, while consistent with decisions from a few circuits, are directly contrary to the holdings of other courts of appeals and district courts with respect to whether Federal Rule of Civil Procedure 60(b) is a proper vehicle for preventing an innocent party from being punished for his attorney's misconduct. Milton

Reiner submits that this court should grant his petition for writ of certiorari in order to provide a uniform answer to the question of whether a party against whom a default judgment is entered as a result of his attorney's gross misconduct is entitled to relief under Rule 60(b).

Milton Reiner petitioned the district court for relief under both Rule 60(b)(1) and 60(b)(6). The relevant portion of the rule states:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . . (6) any other reason justifying relief from the operation of the judgment.

This court has never addressed the question of whether, and to what extent, the alleged wrongful conduct of an attorney should be attributed to his client in the context of a motion by the client to set aside a default judgment for substantial money damages. The seminal case concerning Rule 60(b)(6) is *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384 (1948). In setting aside a default judgment which had cancelled the petitioner's certificate of naturalization, Justice Black in his plurality opinion noted:

> Furthermore Rule 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the "other reason" clause for all reasons except the five particularly specified [in subsection (b)(1)-(5)] vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

335 U.S. 614-15.[4]

Most of the courts of appeals which have considered the issue subsequently, have determined that Rule 60(b)(6) serves as the proper vehicle for relieving an innocent party from the unjust results of his attorney's gross misconduct. See, e.g., *L.P. Stuart, Inc. v. Matthews*, 329 F.2d 234 (D.C. Cir. 1964); *United States v. Cirami*, 563 F.2d 26 (2d Cir. 1977);[5] *Jackson v. Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1978); *Boughner v. Secretary of HEW*, 572 F.2d 976 (3d Cir. 1978); *Carter v. Albert Einstein Medical Center*, 804 F.2d 805 (3d Cir. 1986). *Carter*, for example, although recognizing the proposition that a party is ordinarily responsible for his attorney's conduct, nevertheless, noted that ". . . We have increasingly emphasized visiting sanctions directly on the delinquent lawyer, rather than on a client who is not actually at fault." *Carter, supra* at 807. The District of Columbia Circuit also noted in *Jackson, supra:*

> When a client does not knowingly and freely acquiesce in his attorney's neglectful conduct, but instead is misled into believing that the attorney is industrious, dismissal is not only a harsh step but one for which the circumstances provide little support for an agency theory as a rationale.

Jackson, supra at 122 n. 18. Indeed, the leading circuit court opinion to the contrary, *Schwarz v. United States*,

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4. It is worthy of note that in affording Klapprott relief, this court noted Klapprott's inability to afford counsel at the time the original denaturalization proceedings were commenced and his efforts, not unlike Milton Reiner's efforts here, to attempt to locate counsel to represent him. As did Reiner, Klapprott eventually located counsel who promised to file the necessary opposition but failed to do so. *Klapprott, supra* at 604.

5. It should be noted that at a later evidentiary hearing appellant in *Cirami* did not prove the allegations which the court of appeals held would have warranted Rule 60(b)(6) relief. *United States v. Cirami*, 92 F.R.D. 483 (ED NY 1981).

384 F.2d 833 (2d Cir. 1967) noted that although the district court had not abused its discretion in ordering dismissal, the court should in the future:

> . . . Keep in mind the possibility, in future cases of inexcusable neglect by counsel, of imposing substantial costs and attorney's fees payable by offending counsel personally to the opposing party, as an alternative to the drastic remedy of dismissal.

384 F.2d at 836.

At least one leading commentator has reached the same conclusion:

> In [*Schwarz v. United States, supra*] the court suggested that in the future in cases of inexcusable neglect of counsel the district court should bear in mind as a possible alternative to the drastic sanction of dismissal the possibility of assessing substantial costs to be paid personally by the offending attorney. *Clearly this is the solution most consistent with the rules.* (Emphasis supplied).

7 J. Moore, Federal Practice, paragraph 60.27(2) at 288.

In the courts below, Toledo Hotel argued that this court's decision in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) required the conclusion that Milton Reiner was bound by the consequences of Lori Reiner's acts and omissions. First, *Link* was not a Rule 60(b) case and no decision of this court has ever held its reasoning applicable to Rule 60(b). Moreover, it is clear that application of *Link* to the Rule 60(b) context has created a considerable amount of consternation for lower courts not inclined to routinely punish a litigant for the failures of his counsel. See, e.g., *Jackson, supra* at 123:

> . . . and while appellate review is limited by the binding authority of *Link* to whether judicial discretion has been abused, a sound discretion hardly comprehends a pointless exaction of retribution.

Given lower courts' difficulties with *Link* and the fact that it commanded the vote of only four justices, the court's attention is respectfully directed to Justice Black's dissent in which Chief Justice Warren joined:

> Even assuming in the face of these plain facts, however, that all the blame for the six years' delay in this case could be laid at the feet of plaintiff's lawyer, it seems to me to be contrary to the most fundamental ideas of fairness and justice to impose the punishment for the lawyer's failure to prosecute upon the plaintiff who, so far as this record shows, was simply trusting his lawyer to take care of his case as clients generally do . . . . One may readily accept the statement that there are circumstances under which a client is responsible for the acts or omissions of his attorney. But it stretches this generalized statement too far to say that he must always do that. This case is a good illustration of the deplorable kind of injustice that can come from the acceptance of any such mechanical rule.

Link, supra at 643-645 (Black, J. dissenting).

The lack of consistency in the holdings of the various district and circuit courts in resolving motions predicated on inexcusable attorney neglect demonstrates the precise reason why this court should intercede to provide specific instruction with respect to the appropriate handling of such contentions. In the instant matter, Milton Reiner's personal omissions which have resulted in the default judgment against him amount to his failure to accept a certified mail letter which delayed Toledo Hotel's ability to make service for a matter of days and his willingness to accept the representations of his attorney (and daughter) that she was doing all that could be done to set aside the default which had been entered against him. Rather than finding that Lori Reiner's misrepresentations were basis for relieving Milton

Reiner of the judgment, the district court and court of appeals utilized those misrepresentations and Lori Reiner's other derelictions as the basis for refusing to grant relief.

The extent to which such a holding diverges from results reached in similar fact situations in other circuits can best be demonstrated by comparing the instant matter with the facts set forth in a recent district court decision in the Seventh Circuit, *In Re Robenson*, 19 Fed.R.Serv. 3d 1459 (N.D. Ill. 1991). In *Robenson*, petitioner moved pursuant to Rule 60(b)(6) for an order vacating an order dismissing her appeal from a final order entered by the bankruptcy court. Petitioner alleged that she had retained counsel to represent her in the bankruptcy case and accompanying reorganization. It was alleged that counsel not only had failed to effect the representation but had lied to petitioner on numerous occasions concerning the status of the matter including a failure to advise petitioner that counsel had never filed a plan for reorganization.

Clearly, if counsel's gross negligence were to be attributed to his client, a basis for setting aside the default would not have existed. Instead, the district court, noting that the Seventh Circuit itself has not yet resolved whether an attorney's neglect of a diligent client is an adequate basis for relief under Rule 60(b)(6), elected to follow the cases which hold that it is. The court specifically noted that the petitioner had averred that she had frequently telephoned her attorney to check on the status of the matter, an averment made by Milton Reiner in the instant action which was unrefuted in the record below. The Robenson court concluded:

> A client is not and should not be expected to double check the information her attorney gives her about her case. The attorney-client relationship is based upon trust — one doesn't hire an attorney unless one believes that one can trust that person to

> vigorously (or at least adequately) pursue one's cause. [Counsel's] neglect, as detailed by [petitioner], was certainly not "excusable" — it was unconscionable. These facts justify the extraordinary remedy of relief under Rule 60(b)(6).

19 Fed.R.Serv. 3d at 1461.[6] The similarities between *Robenson* and this matter are self evident.[7]

The reported cases contain several other examples of situations where courts in other circuits have relied on attorney misconduct as a basis for setting aside a default judgment rather than imposing responsibility for such conduct on an innocent client. In *Ituarte v. Chevrolet Motor Division*, 1989 U.S. Dist. Lexis 1146 (E.D. N.Y. 1989), the plaintiffs' personal injury action was dismissed after their attorney failed to respond to numerous discovery requests. On a subsequent Rule 60(b)(6) motion, plaintiffs submitted evidence that the attorney had been depressed and anxious during the period of time in question, focusing his attention on problems and

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6. The Robenson court also noted a second justification for Rule 60(b)(6) relief. Part of petitioner's loss included the loss of a lifetime rental interest in her home. The court noted that an attorney malpractice action could not regain petitioner's home. In the instant matter, it should be noted that a malpractice action would require Milton Reiner to sue his daughter for an amount in excess of $1,000,000.

7. Toledo Hotel's brief in opposition to this petition will undoubtedly point to the circumstances surrounding Milton Reiner's alleged submission of a "false affidavit" pertaining to his mental illness as culpable conduct on his part more than sufficient to permit the lower court to deny his motion. Yet the record in the lower court is clear that all of the conduct involving this submission (which Reiner and his attorneys continue to maintain was appropriate although the court of appeals has concluded otherwise) was at the behest of Lori Reiner and not Milton Reiner. Assuming the conduct was wrongful, it simply added an additional item of attorney misconduct which the court of appeals incorrectly attributed to Milton Reiner.

conflicts deriving from a recently formed law partnership and the inability of that partnership to provide him with the support which he anticipated. The court found the matter an appropriate one for relief under Rule 60(b)(6).

In *DeBonavena v. Conforte*, 88 F.R.D. 710 (D.Nev. 1981), the court also confronted a situation where plaintiff's case had been dismissed for failure of her attorney to respond to interrogatories and request for production of documents. On the Rule 60(b)(6) motion, the attorney submitted an affidavit, unsupported by medical evidence, stating that he was "depressed" and suffering a "depression" or "paralysis of mind" during a portion of the crucial period of time when discovery was due. Lori Reiner submitted a similar affidavit and deposition in the instant matter. The DeBonavena court accepted the attorney's representations as a basis for affording relief to his client instead of utilizing the allegations as a basis for charging the client with culpability producing the default.

Similarly, in *In Re: Benhil Shirt Shops, Inc.*, 87 Bankr. 275, 1988 U.S. Dist. Lexis 2699 (SD N.Y. 1988), an affidavit was submitted in support of a Rule 60(b)(6) motion alleging that an attorney whose failures resulted in the dismissal of an adversary proceeding had become ". . . confused and disoriented, and as a result failed to timely pursue [his client's] appeal." Accepting the veracity of the affidavit, also submitted without medical support, the court relied on those allegations as a basis for setting aside the default rather than as a basis for imposing responsibility on the innocent client.[8]

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8. Petitioner recognizes that the First Circuit Court of Appeals recently held in *United States v. Parcel of Land*, 928 F.1d 1 (1st Cir. 1991), that the gross neglect of counsel does not entitle a client to relief under Rule 60(b)(6). However, the court acknowledged that where the gross neglect rises to the level of "extraordinary circumstance", Rule 60(b)(6) would afford relief.

In sum, most district and circuit courts which have considered the issue have refused to attribute the gross misconduct of counsel to the client when considering whether a default judgment should be set aside. Reiner submits that a uniform rule is required so as to avoid results as divergent as the ones reflected in *Robenson, supra,* and the instant matter.

Milton Reiner also suggests to this court that a writ of certiorari is required in order to correct a portion of the court of appeals' opinion which, if allowed to stand, would impose upon defaulted litigants pleading obligations substantially different from those set forth in the Federal Rules of Civil Procedure. Case law in the Sixth Circuit and in most other circuits imposes upon a defaulted defendant seeking the setting aside of a default the obligation to demonstrate to the court that a meritorious defense exists to the plaintiff's claim. See, e.g., *United Coin Meter v. Seaboard Coastline Railroad,* 705 F.2d 839 (6th Cir. 1983).[9]

Toledo Hotel's complaint against the various defendants contained only one count against Milton Reiner. It was entitled "Fraud" and alleged that Reiner made certain false misrepresentations to Toledo Hotel which induced that company to enter into its contract with ACD. (Complaint, para. 43). As set forth in plaintiff's complaint, the alleged falsity went to one and only one issue:

> 44. These representations were to the effect that ACD had the financial ability to perform its obligations under the contract and/or to continue to perform its obligations under the contract and that ACD

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9. At least in the Sixth Circuit, the standard ordinarily is not a difficult one to meet. A meritorious defense is defined as any defense which "states a defense good at law" and it is sufficient if it contains "even a hint of a suggestion which, proven at trial, would constitute a complete defense." *INVST Financial Group v. Chem-Nuclear Systems,* 815 F.2d 391, 398-99 (6th Cir. 1987).

was in fact continuing to perform its obligation under the contract.

Attached to Milton Reiner's motion to set aside the default judgment was an answer which he proposed to file in the event that his motion were granted. The proposed answer specifically denied the allegations of paragraph 44 of Toledo Hotel's complaint. In addition to denying that he made any misrepresentations to Toledo Hotel, Milton Reiner specifically averred:

FIFTH AFFIRMATIVE DEFENSE

American Contract Designers, Inc. entered into its contract with Toledo Hotel Investors Hotel, Limited in good faith and with the expectation that both parties would fully perform their obligations under the contract.

* * * * *

SEVENTH AFFIRMATIVE DEFENSE

American Contract Designers substantially performed its contractual obligations.

* * * * *

TENTH AFFIRMATIVE DEFENSE

The allegations of misconduct alleged against answering defendant have no basis in fact or in law.

Reiner also submitted an affidavit in support of those defenses and also asserted in the affidavit that it was plaintiff and not ACD which breached the contract.

The opinion of the court of appeals adopted the district court's conclusion that those defenses were ". . . not a defense to any fraud he [Reiner] might have committed personally in his capacity as an officer of ACD." (App., infra 4a). To reach that conclusion the court of appeals must have completely disregarded the

fact that the only misrepresentations alleged by Toledo Hotel to have been made by Milton Reiner where those concerning ACD's ability to perform its contractual obligations. Milton Reiner asserted that ACD performed those contractual obligations. If ACD did so, Milton Reiner either made no misrepresentations, as he steadfastly has asserted, or any misrepresentations were immaterial to ACD's ability to complete its contractual undertakings. It is clear that proof either of the fact that Milton Reiner made no misrepresentations or that ACD performed that which it had obligated itself to do would serve as a complete defense to Toledo Hotel's claim against Milton Reiner.

The court of appeals could have concluded otherwise only through a hypertechnical and completely inappropriate application of the Federal Rules of Civil Procedure. Rule 8(b) provides that "[a] party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." Rule 8(e)(1) provides that "[e]ach averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required." Last, Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice."

In support of its conclusion that Milton Reiner's proposed answer did not adequately set forth meritorious defenses, the court of appeals cited to *Maine National Bank v. F/V Cecily B.*, 116 F.R.D. 66 (D. Me. 1987) for the proposition that "general denials or conclusory statements that defense exists are insufficient to demonstrate meritorious defense as factor favoring setting aside default judgment". (App., infra, 4a). First, the facts in Maine National Bank differ substantially from those in the instant matter in that the moving party did not submit an affidavit supporting its position. Milton Reiner did so in the district court. More important, however, is that both the court of appeals' opinion and the district

court's decision in *Maine National Bank* impose a requirement that is found nowhere in the Federal Rules of Civil Procedure and which is in direct conflict with both the letter and spirit of those rules.

The test for sufficiency of a pleading under the federal rules is a liberal one. A pleading is sufficient when it is detailed and informative enough to enable the opposing party to respond. *Kelly v. Schmidberger,* 806 F.2d 44 (2nd Cir. 1986). Generally, if a pleading provides adequate notice of a party's contentions, no more is required at the pleading stage. *Walker v. South Central Bell Telephone Co.,* 904 F.2d 275 (5th Cir. 1990). Pleadings are to be construed liberally so as to do substantial justice. *Mareno v. Rowe,* 910 F.2d 1043 (2nd Cir. 1990).

When viewed against a background comprised of such decisional law, one can only conclude that the court of appeals' opinion in this matter erected an entirely new standard of pleading for parties seeking to set aside defaults. The answer proposed to be filed by Milton Reiner denied that he had made any of the misrepresentations attributed to him and further averred that the corporation of which he was president had fully and completely fulfilled its contractual obligations. If so, any misrepresentations pertaining to the corporation's ability to perform would have been irrelevant. Assuming, arguendo, that a more specific statement could have been made (it being difficult to envision how Milton Reiner could have more adequately apprised Toledo Hotel of his contention that he had made no misrepresentations and that his company had completed its contractual obligations), such statements would more appropriately appear in response to discovery requests or through the filing of pre-trial memoranda.

Milton Reiner respectfully suggests that if a different standard of pleading is to apply in situations where parties seek to be relieved of the onus of a default

judgment, direction in that regard should come from this court, not from a court of appeals. Moreover, nothing in the Federal Rules of Civil Procedure provides support for such a standard which, applied to cases such as the instant one where the defense is that defendant did not make any fraudulent representations, imposes a burden of proof which is impossible to meet without engaging in all the discovery that would be necessary to prepare the case for trial.

CONCLUSION

The petition for writ of certiorari should be granted.
Respectfully submitted.

Louis E. Bricklin, Esquire
(Counsel of Record)

Michael Saltzburg, Esquire

Bennett, Bricklin & Saltzburg
1601 Market Street, 16th Floor
Philadelphia, PA 19103-2316
(215) 561-4300

APPENDIX

TABLE OF CONTENTS

APPENDIX A

FILED JULY 1, 1991

LEONARD GREEN, *Clerk*

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit if cited, a copy must be served on other parties and the Court.

The citation is to be *prominently* displayed if this citation is reproduced.

NOT FOR PUBLICATION

No. 90-3807

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TOLEDO HOTEL
INVESTORS LIMITED
PARTNERSHIP,
Plaintiff-Appellee,

v.

AMERICAN CONTRACT
DESIGNERS, INC.
AND MELANIE REINER,
Defendants,

MILTON REINER,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: RYAN and SUHRHEINRICH, Circuit Judges, and ZATKOFF, District Judge.*

PER CURIAM. Defendant Milton Reiner appeals the district court's denial of his motion to set aside the default judgment. For the following reasons, we AFFIRM.

On October 19, 1988, plaintiff Toledo Hotel Investors ("Toledo") brought this suit alleging breach of contract, false representations, and fraud arising out of a contract entered into between Toledo and defendant American Contract Designers, Inc. ("ACD"). The complaint also alleged that Milton Reiner ("Reiner") and Melanie Reiner, officers of ACD, made misrepresentations to Toledo in the context of their business relationship which constituted fraud. Reiner and Melanie Reiner were alleged to be personally liable for the damages resulting from such misrepresentations and fraud.

Toledo made several attempts to serve Reiner, but was not successful until May 23, 1989. Reiner failed to respond to the complaint, and Toledo filed and served upon Reiner an application for entry of default on July 24, 1989, which was entered by the clerk two days later. On August 21, 1989, Lori Reiner, Reiner's daughter and an attorney with the firm of Bennett, Bricklin & Saltzburg ("BB&S") filed an entry of appearance for herself and BB&S. The court treated it as a motion to appear *pro hac vice* and granted the motion. She did not, however, file any motion to set aside the entry of default, and she also failed to either attend the status call on the default, or the damages hearing on the default judgment, despite notice from the court.

On February 26, 1990 a motion to set aside the default judgment was filed by BB&S on behalf of Reiner. As grounds for the motion Reiner argued that his failure

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*The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

to respond was due to his severe depression; and second, that Lori Reiner's neglect of the case was attributable to her intimate emotional involvement. The motion was supported by the affidavits of Reiner, Lori Reiner and Reiner's psychiatrist, Dr. Howard Green.

The district court denied the motion, holding that Reiner's actions unequivocally displayed an intention to thwart judicial proceedings and that he failed to present a meritorious defense. This appeal followed.

II.

The mechanism for setting aside default judgments is Fed. R. Civ. P. 60(b) , which provides that a court may relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect, or any other reason justifying relief from operation of the judgment. Fed. R. Civ. P. 60(b)(1) & (6). *See Amernational Indus. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991). In determining whether to set aside entry of default judgment, a court must weigh the following three factors: (1) whether the plaintiff will be prejudiced from reopening the case; (2) whether the defendant has a meritorious defense; and (3) whether the culpable conduct of the defendant lead to the default. *United Coin Meter Co. v. Seaboard Coastal Line RR*, 705 F.2d 839, 845 (6th Cir. 1983).

The decision to grant or deny a Rule 60(b) motion is discretionary with the district court and will be reversed on appeal only if we find that the district court abused that discretion. *Amernational*, 925 F.2d at 975. "Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *Id.* (citation omitted).

Our first inquiry under *United Coin* is whether plaintiff will be prejudiced if the judgment is vacated. Delay alone is not a sufficient basis for establishing prejudice; rather it must be shown that delay will result

in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion. *INVST Fin. Group v. Chem-Nuclear Systems,* 815 F.2d 391, 398 (6th Cir. 1987). In the instant case the district court did not make a specific finding as to this factor. However, Toledo argues that from the onset of this lawsuit, Reiner and his attorneys have presented the district court and Toledo with ever changing legal theories and factual assertions, and further delay will provide for greater opportunity for fraud and collusion between defendant and his counsel. This allegation is borne out by the pattern of conduct already exhibited in this case.

The second factor to be considered is whether defendant has a meritorious defense to the suit. Meritorious defense is defined as any defense which "states a defense good at law;" and it is sufficient if it contains "even a hint of a suggestion which, proven at trial, would constitute a complete defense." *INVST,* 815 F.2d at 398-99 (citations and quotations omitted). As noted by the district court, defendant in his proposed answer generally denied the fraud, and he argued below that ACD performed its contractual obligations and that any failure to perform was due solely to its financial difficulties. The district court found however that this defense was not a defense to any fraud he might have committed personally in his capacity as an officer of ACD. We agree and thus, find no abuse of discretion as to this finding. See *Maine Nat'l. Bank v. F/V Cecily B.,* 116 F.R.D. 66 (D. Me 1987) (general denials or conclusory statements that defense exists are insufficient to demonstrate meritorious defense as factor favoring setting aside default judgment).

Finally, we must examine defendant's culpability. To be treated as culpable, "the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct in those proceedings." *INVST,* 815 F.2d at 399 (quoting

Shepard Claims Serv., Inc. v. William Darrah & Assoc., 796 F.2d 190, 194 (6th Cir. 1986)).

Here the district court relied upon a number of factors. First, the court found that Reiner actively and admittedly avoided service of process in this case. Reiner admitted in deposition testimony that he had received at least two copies of the complaint through regular mail and that it was his practice to avoid accepting certified mail. He also admitted that he was cognizant of the requirement of filing an answer to the complaint. Thus, as the district court found, Reiner was responsible for the initial nine month delay of this suit.

Secondly, as also found by the district court, Reiner submitted false information to the court. Lori Reiner drafted and submitted the affidavit from defendant's psychiatrist Dr. Green to explain why her client had evaded service of process and failed to respond to the complaint brought against him in 1989 the year the suit was filed. Yet she did not mention the relevant time period to Dr. Green and failed to put it in the affidavit. The affidavit later had to be withdrawn after the deposition testimony of the doctor revealed that Reiner's depression was in remission in 1989. Third, after this excuse was no longer viable, Reiner and counsel advanced the excuse of financial impecunity. Yet, as noted by the district court, other than Reiner's testimony that he had only $800 in a checking account, no financial information was submitted to the court to allow it to determine whether defendant was financially unable to retain counsel.

Finally, defendant's attempts to separate his conduct from that of his attorney, are similarly unavailing. As correctly noted by the district court, in *Shepard Claims* the delay was the result of misunderstanding between counsel, not deliberate neglect on counsel's part. Here, counsel actively mislead her client, disregarded court notices to attend two hearings and failed to file a motion to vacate the entry of default. Further, Lori

Reiner stated that her personal involvement prevented her from performing her duties as an attorney in this case. Yet after plaintiff exposed the lack of Reiner's mental incapacity during 1989, Lori Reiner's conduct was then characterized as "culpable". In any event, she failed to provide any support for her mental incapacity claim, such as a psychiatrist's affidavit.

After carefully reviewing the record, we conclude that the district court articulated sufficient reasons for refusing to set aside the default judgment. The conduct of defendant and his counsel in this case far exceed the type of conduct that can be deemed "excusable neglect." Thus we are unable to say that the trial court committed a clear error of judgment. AFFIRMED.

Attest:

LEONARD GREEN, Clerk
By: _____
Deputy Clerk

APPENDIX B

FILED
89 DEC-1 PM 3:49

CLERK U.S DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TOLEDO HOTEL INVESTORS LIMITED PARTNERSHIP	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	
	:	Number C88-3902
AMERICAN CONTRACT DESIGNERS INC., et al.,	:	
Defendants.	:	

ORDER

IT IS ORDERED that default judgment is hereby entered against Milton Reiner in the amount of $1,022,921.00, pursuant to Rule 55 of the Federal Rules of Civil Procedure.

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Attest:

By: _____
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TOLEDO HOTEL INVESTORS LIMITED PARTNERSHIP	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	
	:	Number C88-3902
AMERICAN CONTRACT DESIGNERS INC., et al.,	:	
Defendant.	:	

MEMORANDUM AND ORDER

ALDRICH, J.

Milton Reiner moves, pursuant to Federal Rule of Civil Procedure 60(b)(1), to set aside the default judgment entered against him. This action was originally brought in October 1988. A default was entered against defendant Milton Reiner in July 1989 and judgment was entered on December 1, 1989. Reiner, on February 26, 1990, moved to set aside the judgment[1]. For the reasons stated, this Court denies that motion, grants the motion to strike Reiner's letter to this Court, and grants Toledo Hotel Investor's ("Toledo") request for sanctions.

The facts necessary to decide this motion are as follows. Toledo brought this action in October 1988 and was unable to complete service on Milton Reiner until May 23, 1989. Reiner, during his deposition, admitted that he avoided service and that it was his practice to avoid accepting certified mail. After service was finally made, Reiner states that he sent the complaint to his

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1. Reiner, in January 1990, had also filed an appeal of the judgment. This appeal was voluntarily dismissed in May 1990.

attorney, Gabe Aksvoitz who refused to file an answer for him because Reiner owed him money for previous services.

In July 1989 when Reiner received Toledo's application for entry of default, he contacted his daughter, Lori K. Reiner, an attorney at Bennett, Bricklin and Saltzburg ("BB&S"). He had previously been represented by BB&S in another matter. A default was subsequently entered against him. Lori Reiner then, in August 1989, wrote this Court and asked to appear pro hac vice. Her request was granted. However, she then failed to file any motion to set aside the entry of default and, despite receiving notice, she also failed to attend either the status call on the default, or the hearing to determine the proper amount of the default judgment.

Lori Reiner did, however, contact one attorney in Cleveland regarding his appearance as local counsel. She discussed the case with other lawyers at BB&S and she discussed it with counsel for Toledo. She spoke and corresponded with Dr. Green, her father's psychiatrist. She also researched the law concerning vacating defaults and judgments. Various partners at BB&S discussed the status of the case with her and she then prepared and filed an appeal. Lori Reiner repeatedly assured her father and the partners in BB&S that the appropriate motions were being filed in the case despite the fact that they were not.

This motion to set aside the judgment has been filed by BB&S on behalf of Milton Reiner and it presents two factual claims in support of Reiner's position. First, Reiner argues that he was unable to respond because he was suffering from severe depression. Reiner had been receiving ongoing psychiatric care from Howard Green, M.D. since May 16, 1987. To support this position, Reiner submitted an affidavit from Dr. Green. Second, Lori Reiner's neglect of the case was attributed to her "close emotional involvement with the psychological and financial difficulties facing her family." Motion at ¶13.

Toledo, when faced with this motion undertook discovery and deposed Dr. Green, Reiner and Lori Reiner. The deposition testimony of Dr. Green made it clear that the affidavit, which was admittedly prepared by Lori Reiner and submitted by BB&S, was false and misleading. Dr. Green testified that during 1989 Reiner was not depressed and that his depression was in full remission. Dr. Green testified that in 1989, Reiner was fully capable of addressing and dealing with negative situations such as a lawsuit. Reiner has since withdrawn any reliance on that affidavit. Specifically, Reiner states:

> There is no question but that Dr. Green's testimony at deposition contradicts the statements of his affidavits and, therefore, any reliance on that affidavit or Milton Reiner's psychiatric condition as a basis for setting aside the default judgment must be withdrawn.

Reply Brief at pg. 7.

Reiner now argues that his failure to respond should be excused because he was financially unable to obtain counsel to take appropriate steps. However, the only evidence in support of this position is Reiner's testimony that at some time in 1989 he only had $800.00 in his checking account.

Lori Reiner has also stated that she was so emotionally distraught over this case that she was not capable of responding appropriately. No psychiatric or psychological evidence has been presented to support this proposition. BB&S has stated:

> The foregoing recitation is not to suggest that either Lori Reiner or Bennett, Bricklin and Saltzburg should be held to any lesser standard of professional conduct because either the attorney or her firm was not paid for services rendered. Certainly the firm, and presumably Ms. Reiner, understand

and realize that much of Ms. Reiner's conduct was unprofessional and may well be subject to sanctions.

Reply at pg. 5.

III .

Reiner moves, pursuant to Federal Rule of Civil Procedure 60(b)(1), to set aside the default. This rule provides:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . .

In determining whether to set aside the entry of a default judgment, the court must examine the following three factors: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default. *Invst Financial Group v. Chem-Nuclear Systems,* 815 F.2d 391, 398 (6th Cir.), *cert. denied,* 484 U.S. 927 (1987)(citing *United Coin Meter Co. v. Seaboard Coast Line R.R.,* 705 F.2d 839, 845 (6th Cir. 1983). If a party in default "satisfies the first two requirements for relief and moves *promptly to set aside the default before a judgment is entered,* the district court should grant the motion if the party offers a credible explanation for the delay that *does not exhibit disregard for the judicial proceedings. Invst,* 815 F.2d at 399 (emphasis added). To be treated as culpable, a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings. *Id.*

This Court is aware of the strong preference for deciding cases on their merits rather than by default

judgment. *Invst,* 815 F.2d at 397. However, this Court, for the reasons set forth below, finds that denial of the motion to vacate the judgment is appropriate because Milton Reiner's actions unequivocally display an intention to thwart judicial proceedings, and because he has failed to present a meritorious defense.

First, Milton Reiner actively and admittedly avoided service of process in this case. He admits that it was his practice to refuse any certified mail and that he had received at least two copies of the complaint through the regular mail. He also admits that he understood that it was necessary to file a response to the complaint. Yet, from October 1988 until May 1989 he effectively avoided service of process of this complaint. Thus, he was a responsible for a nine month delay in beginning this lawsuit.

Second, Reiner, through his daughter and the firm of BB&S[2], has submitted false information to this Court. Indeed, they have had to withdraw the affidavit of Dr. Green and also the proffered excuse that Reiner was emotionally not capable of responding appropriately to this lawsuit. BB&S attempts to shift blame to Dr. Green for the misrepresentations contained in the affidavit. However, Dr. Green has unequivocally stated that Reiner was in remission in 1989. Lori Reiner, as the attorney, never sought to question Dr. Green concerning Reiner's condition on the specific dates which are relevant to this suit. She stated:

> I don't recall my having ever discussed that with him or not discussing it with him. I don't think it would have been important to me since I knew my

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2. BB&S has attempted to argue that they were not "retained" by Reiner in the summer of 1989. However, Lori Reiner admits to opening a BB&S file for her father, using firm stationery to conduct business on the case and discussing the matter within the law firm. This Court can only conclude that Lori Reiner was attempting to represent her father as a member of the firm of BB&S.

> father to be ill since – actually since March of '87 is when I knew him to be suffering from depression . . .

Lori Reiner Deposition at pg. 101. It is not Dr. Green's position to determine what facts are relevant to an issue before the Court – it was and is the attorney's.

When it became clear that the first proffered excuse – emotional incapability – was not viable, Reiner and his counsel put forward a new excuse – financial incapability[3] However, no evidence, other than Reiner's deposition testimony that he had only $800.00 in a checking account, was presented. As Toledo accurately argues, Reiner has not submitted adequate financial information concerning homes, stocks, bonds, jewelry, art etc. for this Court to determine that he was not financially able to retain counsel.

Additionally, Reiner has failed to submit a meritorious defense to the fraud claim brought against him personally. In his proposed answer, he generally denies the fraud and argues that American Contract Designers performed its contractual obligations and that any failure to perform was due solely to its financial difficulties. However, this is not a defense to any fraud he may have personally committed in his capacity as an officer of American Contract Designers.

Reiner's final argument is that he should not be penalized for the misdeeds of his attorney. This Court is not persuaded. The Sixth Circuit, in *Shepard Claims Services v. William Darrah and Associates,* 796 F.2d 190 (1986), stated as follows:

> There is no basis in the record for finding that the present case involved a deliberate attempt by Darrah to delay the proceedings. Although a party who

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3. Toledo's argument concerning the scope of a reply brief is well taken. Reiner's reply brief presented new issues to this Court, and was not confined to replying to Toledo's response.

> chooses an attorney takes the risk of suffering from the attorney's incompetence, we do not believe that this record exhibits circumstances in which a client should suffer the ultimate sanction of losing his case without any consideration of the merits because of his attorney's neglect and inattention.

Id. at 195. In *Shepard,* the delay was the result of misunderstandings between counsel, and not the result of deliberate neglect on counsel's part.

Here, the circumstances are much different. Reiner deliberately avoided service and then, once served, failed to take appropriate action despite his knowledge that a response was required. His attorney did not suffer from any misunderstanding; she clearly understood what was necessary to set aside a default. Lori Reiner inexcusably failed to act.[4] Almost six months passed between the entry of default and the entry of judgment. This was more than ample to time to move to have the default set aside. Then, as the alleged basis for Reiner's failure to respond, BB&S filed an affidavit which is definitely misleading. This Court cannot and will not condone such behavior on the part of Reiner or his attorneys, BB&S.

Also before this Court is a letter from Reiner directly to the Court. Toledo has moved to strike this letter and the Court will grant the motion. Reiner's letter is purely an emotional plea to the leniency of this Court and is not proper. It is neither legal argument nor fact and should not, and will not, be considered.

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4. This Court is not sympathetic to pleas concerning the special nature of the father – daughter relationship. The Court cannot apply different standards of conduct for different attorneys, based on such relationships. If Lori Reiner was not capable of undertaking the representation of her father, she had a professional duty to refrain from doing so.

IV.

This Court finds that imposition of sanctions in this case is appropriate. Toledo has been forced to incur expenses to defend against a motion which lacked merit, and which was based on an affidavit which was not accurate, and which defense counsel with a minimum of effort, should have known was not accurate. Accordingly, Toledo is given twenty days from the date of this order to submit a brief outlining against whom sanctions should be imposed, and also detailing the requested amount of such sanctions. Reiner then has ten days to respond. If Toledo wishes to file a reply brief, it must seek leave of court to do so.

In conclusion, Reiner's motion to set aside the default judgment is denied and Toledo's motion to strike Reiner's letter is granted. The Court reserves ruling on the question of sanctions.

IT IS SO ORDERED.

Ann Aldrich

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TOLEDO HOTEL INVESTORS LIMITED PARTNERSHIP	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	
	:	No. C88-3902
AMERICAN CONTRACT DESIGNERS INC., et al.,	:	
Defendant.	:	

MEMORANDUM AND ORDER

ALDRICH, J.

On August 15, 1990, this Court issued a memorandum and order denying defendant Milton Reiner's motion to set aside the default judgment entered against him and granting Toledo Hotel's request for sanctions. On July 1, 1990, this decision was affirmed by the United States Court of Appeals for the Sixth Circuit. In accordance with this order, Toledo Hotel has filed a brief outlining the amount of sanctions it seeks. Upon review, the Court finds that Toledo Hotel is entitled to $28,664.40 in attorneys' fees and costs.

I.

On October 19, 1988, Toledo Hotel brought this action for breach of contract, misrepresentation, and fraud against American Contract Designers, Inc.

("ACD") and its principal owner, Milton Reiner.[1] Toledo Hotel made several attempts to serve Reiner, but was not successful until May 23, 1989. In his deposition, Reiner admitted that he purposefully avoided service by refusing to accept certified mail. Even with full knowledge of this action, Reiner refused to respond to the complaint. Accordingly, on July 24, 1989, Toledo Hotel filed and served Reiner with an application for entry of default, which was entered by the clerk two days later.

Upon receiving the application for the entry of default, Reiner obtained the legal services of his daughter, Lori Reiner, an attorney at Bennett, Bricklin & Salzburg ("BB&S"). On August 21, 1989, Lori Reiner wrote this Court and asked to appear *pro hac vice*. Her request was granted. She did not, however, file any motion to set aside the entry of default, and she also failed to either attend the status call on the default, or the damages hearing on the default judgment, despite notice from this Court.

In January, 1990, Lori Reiner filed an appeal of the default judgment to the Sixth Circuit Court of Appeals. It soon became apparent, however, after several conference calls with the Circuit's clerk of courts and the attorneys for both parties, that the appeal was ill-advised. [2]

On February 26, 1990, Reiner filed a Rule 60(b) motion to set aside the default judgment. This motion and memorandum in support was signed by Michael Saltzburg, a partner at BB&S. As grounds for the motion, Reiner asserted that his failure to respond was due to his severe depression; and second, that Lori Reiner's

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1. American Contract Designers went bankrupt in 1988, and so this action has principally been prosecuted against its owner, Milton Reiner ("Reiner").

2. In May, 1990, Reiner voluntarily dismissed its appeal. However, on July 1, 1991, the Sixth Circuit did affirm the court's decision to enter default and deny Reiner's motion to vacate the default judgment.

neglect of the case was attributable to her intimate emotional involvement with her father's problems. The motion was supported by the affidavits of Reiner, Lori Reiner, and Reiner's psychiatrist, Dr. Howard Green. Lori Reiner admits that she prepared Dr. Green's affidavit.

In response to this motion, Toledo Hotel deposed Dr. Green, Reiner, and Lori Reiner in New York and Philadelphia. The deposition testimony of Dr. Green made it clear that his affidavit was false and misleading. Dr. Green testified that during 1989, Reiner's depression was in full remission. Thus, according to Dr. Green's testimony, Reiner was fully capable of addressing and dealing with negative situations such as a lawsuit.

In its reply brief, Reiner withdrew his reliance on Dr. Green's affidavit and put forth a different defense, *i.e.*, that Reiner was financially incapable of responding to a lawsuit. This defense, however, was not substantiated by any evidence other than the statement that Reiner had $800 in his checking account. Moreover, it was a new issue, inappropriate for a reply brief, and requiring Toledo Hotel to write a surreply brief in response. Reiner's reply brief was signed by Louis Bricklin, also a partner at BB&S.

On August 15, 1990, this Court denied Reiner's motion to vacate the default judgment entered against him. This Court also found that sanctions were appropriate against Reiner and his attorneys to compensate Toledo Hotel for the expenses it incurred in defending a meritless Rule 60(b) motion based on a false affidavit. Accordingly, this Court ordered Toledo Hotel to submit a brief outlining the amount of sanctions and the parties against whom they should be assessed.

In its brief, Toledo Hotel detailed every hour worked and every disbursement made in the prosecution during this lawsuit. The hours that each attorney worked on the case were billed at the firm's usual billing rates. In total,

Toledo Hotel has asked for $47,507.44 in attorneys' fees and costs. This request can be broken down as follows:

Attorneys' Fees

Attempts at service	$ 652.50
Motion for default judgment	213.75
Trial court appearances (i.e. default judgment damage hearings)	2,112.50
Appeal	2,270.00
60(B) issues	
Research	3,786.25
Depositions	12,958.75
Brief in Opposition	7,410.00
Surreply Brief	5,147.50
Motion to Strike	358.75
Collection Efforts	636.25
Fee Application	7,040.00

Cash Disbursements

Westlaw Research on 60(B) issues	$278.60
Deliveries to Reiners' Attorneys	
Pre-Motion to Vacate Deliveries	20.10
Brief in Opposition	14.50
Surreply Brief	19.50
Dr. Robert Alcorn consultation fee	450.00
Deposition Expenses	4,159.09
Fax Transmission regarding appeal	2.70
	$47,507.44

II.

This Court has the power to sanction Reiner's attorneys under Federal Rule of Civil Procedure 11 which provides in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other papers; that to the best of his knowledge, information and belief *formed after reasonable inquiry* it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that *it is not interposed for any improper purpose,* such as to harass or to cause unnecessary delay or *needless increase in the cost of litigation.*

Fed.R.Civ.P. 11 (emphasis added). In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, __ U.S.__ , 111 S.Ct. 922, 928 (1991), the Supreme Court held that Rule 11 imposes an objective standard of reasonable inquiry on an attorney or a represented party who signs a pleading, motion, or other papers (*i.e.*, affidavit) submitted to the court. One of the objectives of the rule, the Court held, "is to deter baseless filings., *Id.* at 934. In applying this objective standard, this Court must "avoid using the wisdom of hindsight" and instead test the reasonableness of the signer's conduct at the time the pleading, motion, or other paper was submitted. *See* Advisory Committee Note to Fed.R.Civ.P. 11; *Century Products v. Sutter,* 837 F.2d 247 (6th Cir. 1988).

Under Rule 11, "if a pleading, motion, or other paper is signed in violation of the rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction." Fed.R.Civ.P. 11. In *Business Guides,* the

Court held that anyone who signs a document is sanctionable for violations of the rule.[3] It left open, however, the question of "whether or under what circumstances a nonsigning party may be sanctioned." *Id.* at 935. Thus, only the attorney who signed the improper pleading, motion or other paper will be sanctioned in this Court under Rule 11.

While an assessment of attorneys' fees is not a mandated sanction under Rule 11, the Court in *Business Guides* explained that if attorneys' fees are assessed under Rule 11, they should "shift . . . the cost of a discrete event (the specific filing)." 111 S. Ct. at 934. Thus, this Court finds that Reiner's attorneys are only to be sanctioned for the fees and costs directly caused by their improper filing.

In its memorandum of August 15, 1990, *this Court found that Reiner's motion to vacate the default judgment was not well-grounded in law or fact, and that the attorneys who signed the motion and their supporting memoranda should have known this after a reasonable inquiry.* Thus, this Court now holds that the individuals who signed these papers are sanctionable under Rule 11 and orders them to pay a reasonable amount of the attorneys' fees and costs incurred by Toledo Hotel to defend against the Rule 60(b) motion. The fees and costs for research, depositions, and drafting of the brief in opposition to the motion ($29,057.19) are attributable to the filing of the Rule 60(b) motion, signed by Saltzburg. The fees and costs for the reply brief ($5,162.00) are attributable to the filing of the reply brief, signed by Bricklin.

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3. In signing the motion to vacate the default judgment, Saltzburg relied on the assurances of Lori Reiner that the motion was well-grounded in law and fact. However, this does not excuse him. As the Court In *Business Guides* held, [T]he purposes of Rule 11 in to bring home to the individual signer his personal, nondelegable responsibility . . . to validate the truth and legal reasonableness of the papers filed." 111 S.Ct. at 931 (citations omitted).

The attorneys' fees and costs that Toledo Hotel incurred in this case to obtain and collect the default judgment are expenses that cannot be attributed to any sanctionable conduct. Indeed, they are expenses that would have been incurred even if Reiner and his attorneys did not become involved in this case at all. The fees and costs incurred in the attempts to serve Reiner are also not attributable to any sanctionable conduct. Accordingly, these expenses will not be assessed against Reiner or his attorneys.

In addition, the fees and costs incurred during the appeal will not be assessed against Reiner or his attorneys. Rule 11 only applies to papers filed in the United States District Courts. Frivolous appeals are sanctionable only by the United States Court of Appeals under 28 U.S.C. §1912 and Fed.R.App.P. 38. *See Webster v. Sowders,* 846 F.2d 1032, 1040 (6th Cir. 1988). Thus, this Court has no power under Rule 11 to sanction Reiner or his attorneys for the costs attributable to the appeal.

Even though Lori Reiner did not sign the motion to vacate the default judgment, she played such an integral part in its preparation that this Court also sanctions her for its improper filing under 28 U.S.C. §1927.[4] The Sixth Circuit has held that this statute authorizes the court to sanction an attorney who "knows or reasonably should have known that a claim pursued is frivolous." *Jones v. Continental Corp.,* 789 F.2d 1225, 1230 (6th Cir. 1986). The Rule 60(b) motion was based on two grounds – Reiner's depression and Lori Reiner's intimate emotional involvement. Lori Reiner developed both grounds obtaining affidavits from Dr. Green, her father, and herself to substantiate the claim. After a reasonable

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4. Lori Rainer did sign her own affidavit which was submitted solely for the purposes of establishing a legal basis for the motion to vacate the default judgment. Therefore, she may also be held liable under Rule 11 as well.

inquiry into the law, she should have known that these grounds and thus the filing of her affidavits were frivolous. Moreover, she should have known about the actual dates of her father's depression and remission. Therefore, this Court holds her jointly liable with Saltzburg for the fees and costs attributable to opposing the Rule 60(b) motion.

A formal hearing on the issue of sanctions is not required. Reiner and his attorneys have had notice and an opportunity to be heard through a 28-page brief in opposition and the filing of extensive affidavits describing their conduct in this case. Moreover, since *the sanctions are based on " 'counsel's incompetence in handling [the] matter by making frivolous and worthless claims without first making a proper inquiry into the relevant law and facts,' " such a hearing is not necessary. See INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.,* 815 F. 2d 391, 405 (6th Cir. 1987) (citing *Rodgers v. Lincoln Towing Service,* 771 F.2d 194, 206 (7th Cir. 1985)).

III.

Having determined that Toledo Hotel is entitled to recover reasonable attorneys' fees and costs attributable to the filing of the Rule 60(b) motion, the Court must now determine what fees are reasonable. In *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), the Sixth Circuit developed a framework for calculating reasonable attorneys' fees:

> We conclude that an analytical approach, grounded on the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result.

Northcross, 611 F.2d at 642-43. A reasonable fee can be derived by multiplying the hours of service times a reasonable hourly rate. *Id.*

This Court is under no duty to reimburse Toledo Hotel for all of their expenses incurred in this action. Toledo Hotel has a duty to mitigate these expenses as much as possible. As stated by the Sixth Circuit in *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.,* 815 F.2d 391, 404 (6th Cir. 1987):

> A reasonableness inquiry necessarily requires a determination as to what extent plaintiff's expenses and fees could have been avoided and were self-imposed. When counsel is called upon to defend against its adversary's unreasonable motion practices, he must mitigate damages by correlating his response, in terms of hours and funds expended, to the merits of the claim.

The defense against Reiner's Rule 60(b) motion and appeal did not require the amount of hours and funds that Toledo Hotel's attorneys expended in this case. The legal issues surrounding the motion were not difficult, and the depositions not complex. Reiner's Rule 60(b) motion and appeal were so meritless as to be sanctionable. And yet, Toledo Hotel now claims that it had to spend 172.5 hours ($16,796.25) to research and brief the Rule 60(b) issues.

Even though the defense of Reiner's Rule 60(b) motion was neither complex nor difficult, Toledo Hotel still used attorneys whose billing rates were $210/hour and $175/hour. While these attorneys generally engaged in a supervisory role that did not require too many hours, Mr. Kennedy, whose billing rate is $175/hour, performed all of the depositions. (68 hours).

In *Northcross,* the Court held:

> In determining the level of compensation, . . . the court should look to the fair market value of the services provided. In most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney for his or

> her services will normally reflect the training, background, and experience and skill of the individual attorney.

611 F.2d at 638. There is no question that the attorneys' hourly rates are reflective of the experience and skill of the individual attorneys who worked on this case. Nevertheless, given the lack of complexity of the Rule 60(b) motion and the depositions performed in preparation therefore, Toledo Hotel could have used attorneys with less experience and skill who could have more than competently performed the required services.

Moreover, Toledo Hotel could have used a fewer number of attorneys to oppose the Rule 60(b) motion. Toledo Hotel had up to six different attorneys working on this case. This resulted in numerous inefficiencies. Many tasks took longer because each attorney had to spend time becoming acquainted with the case and all its developments. Many of the hours itemized are conferences where the attorneys briefed each other on the developments in the case. Duplication and general excessiveness inherently resulted.

Because they chose to use six attorneys with higher billing rates than required does not mean that this Court should fully compensate them for this choice. All the Court needs to compensate them for is the amount reasonably necessary to defend Toledo against Reiner's motion and appeal. *See INVST,* 815 F.2d at 404.

In *Louisville Black Police Officers v. City of Louisville,* 700 F.2d 268, 279 (6th Cir. 1983), the Sixth Circuit held that it was within the district court's discretion to accept as accurate the number of hours claimed, and then reduce them by a specific percentage for excessiveness. In that case, the district court reduced the claimed hours by 25% and 50%.

Accordingly, this Court, in its discretion, orders that Toledo Hotel's claimed expenses for its defense of Reiner's motion to vacate the judgment be reduced by 25% because of duplication, general excessiveness, and high billing rates.

Based on this formula, Saltzburg and Lori Reiner are each to be sanctioned for $10,896.45, and Bricklin is to be sanctioned for $3,871.50.

IV.

Besides the costs directly attributable to the Rule 60(b) motion, Toledo Hotel should also be compensated for the hours its attorneys spent preparing the fee application. *See Coulter v. Tennessee,* 805 F.2d 146, 151 (6th Cir. 1986), *cert. denied* 482 U.S. 914 (1987). In that case, the Sixth Circuit imposed a severe limitation on the number of hours that could be spent. "Absent unusual circumstances," the court held that the hours that their attorneys spend "preparing and litigating an attorney fee case should not exceed 3% of the hours spent in the main case when the issue is submitted on the papers without a trial." *Id.* at 151. This limitation was deemed necessary in order "to insure that the compensation from the attorney fee case will not be out of proportion to the main case and encourage protracted litigation." *Id.*

Toledo Hotel spent 299.25 hours litigating the main case and 70.25 hours on the attorney fee application. Under the *Coulter* standard, Toledo Hotel should have spent just 9 hours preparing the fee application. However, there are some unusual circumstances which justified Toledo Hotel spending more time on the application. This application required more than just a straight forward accounting of billable fees and costs. It also required discussion of the grounds for the sanctions and a discussion of which persons should be sanctioned.

Thus, it was reasonable for Toledo Hotel to spend more than 9 hours on its fee application.

Nevertheless, 70.5 hours on a fee application is excessive. Again, five attorneys worked on the application which included a 15-page reply brief citing the same cases as the original brief, and a supplemental brief. In order to make the amount of hours spent on the fee application more proportional to the amount of hours spent on the fee application on the main case, the hours will be limited to 10% of the hours spent in the main case (*i.e.,* 30 hours) across the board. Based on this reduction, the attorneys' fees for the fee application are reduced to $3,000 to be apportioned in accordance with the amounts of sanctions already assessed. Under this formula, Saltzburg and Lori Reiner are liable for 85% of this amount ($1,275 each) and Bricklin is liable for 15% ($450).

V.

In sum, Toledo Hotel is entitled to attorneys' fees and costs in the amount of $28,664.40. The Court orders Michael Saltzburg and Lori Reiner to each pay $12,171.45 and orders Louis Bricklin to pay $4,321.50 to Toledo Hotel as sanctions for violating Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. §1927.

IT IS SO ORDERED.

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TOLEDO HOTEL INVESTORS	:	FILED
LIMITED PARTNERSHIP	:	91 JUL 7 AM 9 34
Plaintiff,	:	
	:	Civil Action No. C88-3902
vs.	:	
	:	
AMERICAN CONTRACT	:	
DESIGNERS INC., et al.	:	
Defendant.	:	

ORDER

ALDRICH, J.

The Court has filed its memorandum and order granting plaintiff attorney fees of $28,664.40 as sanctions; therefore,

IT IS ORDERED, that Toledo Hotel is entitled to attorneys' fees and costs in the amount of $28,664.40.

IT IS FURTHER ORDERED that Michael Saltzburg and Lori Reiner each pay $12,171.45, and Louis Bricklin pay $4,321.50 to Toledo Hotel as sanctions for violating Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. §1927.

IT IS FURTHER ODERED that this case is dismissed in its entirety.

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

No. 91-554

IN THE

Supreme Court of the United States

October Term, 1991

MILTON REINER,
Petitioner,

vs.

TOLEDO HOTEL INVESTORS
LIMITED PARTNERSHIP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Toledo Hotel Investors Limited Partnership ("THILP"), respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit in this case. The opinions of the Sixth Circuit and United States District Court for the Northern District of Ohio, Eastern Division, are unreported; however, they are reproduced in the Appendix to the Petition, pages A1-A6 and A7-A15, respectively.

STATEMENT OF THE CASE

The Petition in this matter results from the district court's denial of a motion to vacate a default judgment under Federal Rule of Civil Procedure 60(b). The Sixth Circuit Court of Appeals affirmed the decision and also denied Petitioner's subsequent motion for reconsideration. In bringing the present Petition, Petitioner is simply seeking to have this Court revisit the facts of this case. This case presents no issues which merit review by this Court, and despite Petitioner's attempts to create a conflict among the Circuits, none exists on the facts of this case.

While Respondent does not disagree with some of the basic facts presented in Petitioner's Statement, Respondent does take issue with the analysis and conclusions in a number of respects. Therefore, pursuant to Supreme Court Rule 22.1, Respondent offers the following statement to correct certain inaccuracies and omissions in the Petition.

Petitioner's Statement of the Case begins in late July, 1989, when Petitioner received the entry of default against him sent by Respondent's counsel. This factual starting point omits probably the most important time period of the lawsuit for the purposes of this Petition—from October, 1988, until May, 1989—when Petitioner actively and admittedly avoided service of process. The record facts indicate that Petitioner admitted that it was his "practice" to refuse any and all certified mail during this time period because he knew people were looking to sue him. (N.T., M. Reiner at 43.) This explains why Respondent's attempts at certified mail were returned as "refused." Petitioner also admitted that he received at least two copies of Respondent's

complaint through regular mail and that he was fully cognizant of the requirement of filing an answer to the complaint. As both the district court and court of appeals found below, Petitioner was therefore responsible for a nine-month delay in this lawsuit.[1] It was only after Petitioner ignored the summons and Respondent secured an entry of default against Petitioner in late July, 1989, that he became sufficiently interested in this lawsuit to contact his attorney-daughter, Lori Reiner.

Lori Reiner's "attempt" to retain Ohio counsel to represent her father consisted of one phone call to one attorney in Cleveland, Ohio. When that attorney required a $50,000 retainer, Ms. Reiner simply abandoned her efforts to find local counsel for her father, and filed an entry of appearance for herself and Bennett, Bricklin & Saltzburg, the Philadelphia law firm at which she was an associate. She then began preparing a defense to the entry of default.

After conducting some initial legal research, Ms. Reiner contacted Howard Green, M.D., a psychiatrist who had previously treated her father. Apparently, Ms. Reiner determined that her father's "illness" prevented him from responding to the lawsuit in 1989. She drafted an affidavit for Dr. Green in which Dr. Green opined that Petitioner had been suffering from severe depression since 1987, and that because of the illness, Petitioner was unable to cope with certain situations, like the lawsuit.

[1] Petitioner argues that there is insufficient evidence to attribute the entire nine-month delay in this case to his actions. Both courts found otherwise. Furthermore, the issue is not length of time one is successful in thwarting the judicial system—it is *intent* to do so. Petitioner clearly intended to and did evade service.

Having finalized the Green affidavit in February, 1990, Ms. Reiner confessed to her father and the partners at BB&S that contrary to what she had previously told her father and BB&S about the status of the lawsuit, she had not filed a motion to set aside the entry of default or attended any of the properly-noticed status calls or default hearings. By that time, Respondent had procured a default judgment against Petitioner. BB&S then assumed responsibility for defending Petitioner's interests and shortly thereafter, filed a motion to vacate pursuant to Federal Rule of Civil Procedure 60(b).

The motion, based solely upon Rule 60(b)(1) "excusable neglect" principles, was premised upon Petitioner's alleged illness, as supported by the Green affidavit, as well as the alleged "excusable neglect" of Ms. Reiner. Petitioner's failure to respond to service of the summons and complaint was attributed entirely to his mental illness. Ms. Reiner's conduct was explained as the result of her emotional incapacity due to her father's illness. Respondent's discovery, however, made it clear that the Green affidavit was "false and misleading" because Ms. Reiner, in drafting the affidavit, had failed to mention the relevant time period to Dr. Green. In fact, Petitioner was not mentally ill during the time period in which he was actively evading service of the summons and complaint. The affidavit was withdrawn by Petitioner.

Petitioner's next brief not only withdrew Dr. Green's affidavit, it also discarded the emotional incapacity and excusable neglect defenses of Petitioner and his attorney. In their place, Petitioner contended that he was too impoverished to respond to the lawsuit. The conduct of Ms. Reiner was now conceded to be sanctionable and

characterized as "culpable" and "gross misconduct" in a belated attempt to utilize Rule 60(b)(6) for relief from the default judgment. Petitioner's Statement of the Case recognizes implicitly that his Rule 60(b)(6) arguments are improper, and attempts to excuse this by arguing that poverty is somewhat "related" to his mental incapacity argument and that he believed the mental incapacity argument was "more than sufficient" to explain his misconduct. (Petitioner's Brief, p. 9.) Unfortunately for Petitioner, it was not sufficient, and as the district court recognized, the Rule 60(b)(6) argument was improper because it went well beyond simply replying to Respondent's argument in its brief in opposition.[2]

Petitioner also argues that the district court improperly concluded that Petitioner had not set forth a meritorious defense for the fraud alleged against him. In fact, the record is absolutely devoid of *any* facts, alleged or otherwise, which would constitute a defense to the personal fraud allegations against Petitioner.

[2] Not only did the lower courts determine that the poverty excuse was improper because it was first raised in Petitioner's reply brief, the courts noted that there was absolutely no evidence in the record to support Petitioner's claim of impecunity.

REASONS FOR DENYING THE PETITION

1. Petitioner's first question was not preserved below.

Although presented to this Court as a general Rule 60(b) question, Petitioner's first question for review is based entirely and specifically upon Rule 60(b)(6). Even the most cursory glance at the Petition indicates that the only mention of Rule 60(b)(1) is an introductory statement that he "petitioned the district court for relief under both Rule 60(b)(1) and 60(b)(6)." (Pet. at p. 15). Having said this, Petitioner then jettisons Rule 60(b)(1) and argues that Rule 60(b)(6) should not be utilized to punish an "innocent" client for the misdeeds of his attorney.

Despite his virtual complete reliance on Rule 60(b)(6) in the Petition, the applicability of Rule 60(b)(6) is not properly before this Court because Petitioner did not preserve it below. As discussed in Respondent's Statement of the Case, Petitioner did not even mention Rule 60(b)(6) or discuss its applicability to the case until his lengthy reply brief, which was a reply brief in name only. Only after Respondent had rebutted the Rule 60(b)(1) "excusable neglect" arguments in its opposition brief did Petitioner seek to utilize Rule 60(b)(6) as grounds for relief.[3]

[3] Rule 60(b)(1) and 60(b)(6) are "mutually exclusive." *See Klapprott v. U.S.*, 335 U.S. 601, 613 (1948) and *Liljeberg v. Health Services Acquisition Corp.*, 109 S.Ct. 2194, 2204, n.14 (1988). Furthermore, Petitioner's Rule 60(b)(6) arguments are factually improper because they are simply the same excuses he unsuccessfully asserted under Rule 60(b)(1). Instead of "excusable neglect," the conduct of his attorney is now described as "gross misconduct" in an attempt to fit that misconduct into Rule 60(b)(6).

The district court recognized Petitioner's belated attempt to argue Rule 60(b)(6), as it began its Memorandum and Order of August 15, 1990, by stating that Petitioner "moves, pursuant to Federal Rule of Civil Procedure 60(b)(1), to set aside the default judgment . . . ." (Appendix to Pet., p. A-8). In discussing Petitioner's new impecunity argument, the court also noted that Petitioner's reply brief "presented new issues to this Court and was not confined to replying to [Respondent's] response." (Appendix to Pet., p. A-13, n.3). Accordingly, the district court refused to even address Petitioner's Rule 60(b)(6) arguments. The court of appeals also did not consider Rule 60(b)(6) as a basis for relieving Petitioner from the default judgment, as it concluded its opinion by stating that "(t)he conduct of defendant and his counsel in this case far exceeds the type of conduct that can be deemed 'excusable neglect' "—the standard in Rule 60(b)(1). No mention was made of the Rule 60(b)(6) standard in the *per curiam* decision. Accordingly, neither the district court nor the court of appeals considered Petitioner's Rule 60(b)(6) arguments, and this Court should afford Petitioner the same lack of consideration.[4]

2. **No conflict exists among the courts on the correct facts of this case.**

Petitioner's attempt to create a conflict among the courts in order to seek another review of the facts overlooks the same essential fact that he has overlooked

[4] Petitioner attempts to claim that his "financial distress" argument in his reply brief is somehow "related" to his "mental incapacity" defense on which he first relied (Pet., p. 9). Neither of the lower courts considered them to be related, as his poverty plea was not even considered by the courts. Similarly, this Court should recognize this "related" argument for what it is—an attempt to bootstrap a belated defense to gain this Court's jurisdiction.

at every juncture of this case—his own culpable conduct. The issue presented for review by Petitioner and the entire discussion is based upon whether an innocent party should be absolved from the sins of his attorney under Rule 60(b)(6). Petitioner suggests that a conflict between the circuits exists on this issue. Any such conflict, if one exists, is totally irrelevant to this Petition because the true facts do not present that issue for review. In fact, both the district court and the court of appeals relied upon "a number of factors" in determining that Petitioner himself was not an innocent party but was culpable as that term is defined by the Sixth Circuit in *Invst Financial Group v. Chem-Nuclear Systems*, 815 F.2d 391, 399 (6th Cir.), *cert. denied*, 484 U.S. 927 (1987).

First, both courts found that "Reiner actively and admittedly avoided service of process in this case." (Appendix to Pet., p. A-5.) Second, he submitted "false information" to the court. (Appendix to Pet., p. A-5.) Third, he advanced a poverty excuse after his mental illness ploy was brought to light by Respondent, and then submitted no financial information to support that new excuse. (Appendix to Pet., p. A-5.) Thus, even without the imputation of his attorney's misconduct, the lower courts still had three separate and independent grounds for culpable conduct *on the part of Petitioner himself* to deny his motion to vacate. Petitioner's entire argument ignores his culpability and questions whether it is proper to attribute the "inexcusable neglect" of Lori Reiner to him. The "innocent" party which is crucial to Petitioner's argument simply does not exist in this case. The "conflict" among the lower courts upon which Petitioner rests jurisdiction of this Court similarly does not exist.

Indeed, every case cited by Petitioner requires that in order to take advantage of Rule 60(b)(6),[5] the client must be blameless. For example, in *L.P. Stuart, Inc. v. Matthews*, 329 F.2d 234, 235 (D.C. Cir. 1964), the court was careful to note that "(o)n the part of Matthews himself, there was no neglect." *See also United States v. Cirami*, 563 F.2d 26, 35 (2d Cir. 1977) (movants' conduct themselves "not explainable as 'inadverten(t), indifferen(t), or careless disregard of consequences.' ") (quoting *Klapprott v. U.S.*, 335 U.S. 601, 603 (1948)); *Jackson v. Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1978) (required client be blameless and "not (to have) personally misbehaved" before 60(b)(6) can be utilized; *Boughner v. Secretary of HEW*, 572 F.2d 976, 979 (3d Cir. 1978) ("absence of neglect" by the parties "is prerequisite to Rule 60(b)(6) relief"); and *Carter v. Albert Einstein Medical Center*, 804 F.2d 805, 807 (3d Cir. 1986) (court should view extent of party's personal responsibility for default).

The law is clear in the factual scenario presented in this case. A culpable client cannot utilize Rule 60(b) to gain relief from a judgment entered because of the misconduct of the client and the client's attorney. That rule was recognized and correctly applied below. Both the district court and the court of appeals held, based on *Shepard Claims Serv., Inc. v. William Darrah & Assoc.*, 796 F.2d 190 (6th Cir. 1986), that because the Petitioner himself was culpable unlike the client in *Shepard Claims*, Rule 60(b) relief was not available. Petitioner has cited no case which holds otherwise. This Petition simply attempts to create an issue where the facts to support that issue are nonexistent.

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[5] This argument, of course, assumes that Rule 60(b)(6) is properly before this Court, which Respondent believes is a faulty assumption.

Petitioner also challenges Respondent's use of *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1948) for the proposition that attorney misconduct is generally imputed to the client. Petitioner charges that the application of *Link* in the Rule 60(b) context has created a "considerable amount of consternation for lower courts." That is untrue, as courts consistently have imputed misconduct of an attorney to the client when the client has also acted wrongfully. That is precisely what the lower courts did in this case by properly distinguishing *Shepard Claims Service, supra*, because the client was innocent in that case, unlike Petitioner. Whether under Rule 60(b)(1) or 60(b)(6), in order to avoid a default judgment, it is beyond dispute that the client must be blameless. Accordingly, there is no need for direction to the lower courts, as they have consistently and correctly determined the issue.

3. The courts below correctly decided the issue of the required specificity of defenses in the Rule 60(b) context.

The second question for review in the Petition relates to the required specificity of the pleading obligations of defaulted litigants. Petitioner maintains that the court of appeals "erected an entirely new standard of pleading for parties seeking to set aside defaults" when it held that Petitioner failed to set forth a meritorious defense as required for Rule 60(b) relief. *See Amernational Indus. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991) and *United Coin Meter Co. v. Seaboard Coastal Line Railroad*, 705 F.2d 839, 845 (6th Cir. 1983) (both requiring a meritorious defense as one of three requirements for Rule 60(b) relief). Petitioner claims that the provisions of Rule 8 apply in the Rule 60(b) context

and contends that the court of appeals applied an incorrect standard. Based on the relevant case law, the decision of the court of appeals was correct.

Petitioner's only defense to the fraud claim levelled against him personally was a general denial in his proposed answer attached to his motion to vacate. The Petition attempts to diffuse this problem by suggesting that affirmative defenses relating to the contractual performance of Petitioner's company, American Contract Designers, somehow state a meritorious defense to the fraud claim. As the lower courts correctly noted, what Petitioner's company did or did not do is not a defense to any fraud he allegedly committed himself. (Appendix to Pet., p. A-4.)

Petitioner's attempt to graft the notice pleading requirements in Rule 8 of the Federal Rules of Civil Procedure onto Rule 60(b) in order to create a reviewable issue out of the lower courts' failure to do so is unpersuasive. It is clear that it is incumbent upon the defendant to allege in his moving papers facts sufficient to constitute a valid defense to the action. More than legal conclusions, general denials, or simple assertions are required of a movant under Rule 60(b) to satisfy the burden of establishing a meritorious defense. *U.S. v. $55,518.05 in U.S. Currency*, 728 F.2d 192 (3d Cir. 1984); *Gross v. Stereo Component Systems, Inc.*, 700 F.2d 120 (3d Cir. 1983); *Cassidy v. Tenorio*, 856 F.2d 1412 (9th Cir. 1988); *Maine Nat'l Bank v. F/V Cecily B.*, 116 F.R.D. 66 (D. Me. 1987).

The Tenth Circuit in fact answers precisely Petitioner's second question for review, which is whether a litigant who has defaulted is required to plead his

defense with greater specificity than required by Rule 8. As the court held in *In re Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978):

> Unlike the simple notice pleading required in original actions, the rule relating to relief from default judgments contemplates more than mere legal conclusions, general denials, or simple assertions that the movant has a meritorious defense.

Here, Petitioner's only defense is a general denial, along with a statement that his company performed all its obligations with Respondent. That was correctly found to be insufficient by the district court and by the court of appeals.

CONCLUSION

Unsatisfied with the decisions below, Petitioner creates issues which do not arise from the facts of this case. The lower court correctly determined the facts and applied them to the relevant law; therefore, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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